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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. ------

BANKERS TRUST COMPANY, as Executor of the Will of HARRIET DELTA ELLIS, Deceased,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on December 12, 1960.

Opinions Below

The opinion of the District Court (R. 29a), printed in Appendix B *infra*, p. 9, is reported in 178 F. Supp. 267. The opinion of the Court of Appeals (R. 37a), printed in Appendix B, *infra*, p. 9, is reported in 284 F. 2d 537.

Jurisdiction

The judgment of the Court of Appeals was entered on December 12, 1960 (R. 43a). Rehearing was denied on January 27, 1961 (R. 48a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented

In computing a federal estate tax using date of death (April 23, 1953) values, should United States Treasury Bonds whose market prices on that date were below par, but which according to their terms could be applied at par in payment of the estate tax, properly be valued at their below-par market value as of the date of death or must they be valued at par?

Statute and Regulations Involved

The statutory provision involved is Section 811(a) of the Internal Revenue Code of 1939, 53 Stat. 120, as follows:

> § 811. Gross estate
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> (a) Decedent's interest. To the extent of the interest therein of the decedent at the time of his death; • • •

The regulations involved are the pertinent portions of paragraphs "(a)" and "(c)" of the Treasury Department's Regulations 105, Section 81.10 (7 F. R. 1429). They are printed in Appendix A, *infra*, p. 7.

Statement of the Case

Harriet Delta Ellis died on April 23, 1953, owning among other things the United States Treasury Bonds described in paragraph 7 of the second amended complaint (R. 3a-4a). The par value of the bonds was $475,000, while their market value on the date of Mrs. Ellis' death was $448,034.38 (R. 38a).

The bonds were of the type which could be applied at par in payment of Federal estate taxes (R. 38a). In the decedent's estate tax return, which used date of death valuations, the bonds were included at par in obedience to a Treasury Department ruling (R. 30a). This resulted in the assessment of an estate tax $13,968.20 higher than the tax which would have resulted had the bonds been valued at their date-of-death market value (R. 31a). The Government's position was that since the bonds could be applied at par to pay the estate tax their value on the date of death could not be less than par (R. 31a).

The higher tax was duly paid, a claim for refund thereof was duly filed and rejected and petitioner brought this action in the District Court to recover said sum of $13,968.20 on the ground that it represented an illegal and excessive estate tax (R. 4a-6a). The jurisdiction of the District Court was invoked under 28 U. S. C. 1346 (a) (R. 3a).

The facts being undisputed each party moved for summary judgment (R. 29a). The District Court entered judgment in favor of petitioner, holding that the estate was entitled to value the bonds at their market price as of the date of the decedent's death (R. 33a, 34a).

On appeal the Court of Appeals reversed and directed the entry of summary judgment in favor of the Government, holding that where the value of the net estate was such that an estate tax became due and the bonds were or could have been applied at par toward the payment of the tax, the value of the bonds on the date of death was not less than par (R. 40a, 42a).

Reasons for Granting the Writ

The question presented is important in the administration of the federal tax laws. According to Moody's Municipal and Government Manual, 1961, there are outstanding approximately $44,000,000,000. Treasury Bonds which may

be applied at par in payment of federal estate taxes. The owners of these bonds are located throughout the United States and the last of the bonds to mature will not fall due until 1998 even if the Government should stop issuing them tomorrow. While the number of estates which own and may own such bonds was not relevant in the courts below and thus is not in the record, the importance of fixing the proper rule for the valuation of securities so widely held and so substantial in amount is evident.

The question presented is purely a question of law. There were no factual issues raised below and a decision by this Court will resolve the matter once and for all without the possibility of the reappearance of the issue in a somewhat different factual guise.

The controlling statute and regulations were not changed in substance or intent by the enactment of the Internal Revenue Code of 1954 and the promulgation of regulations thereunder.* The issue is therefore very much alive and will remain so (except during such periods as all Treasury Bonds of the type in question may be selling above par) until resolved by this Court.

As a result of the decision of the Court of Appeals the valuation for estate tax purposes of interests which are worth one amount during the owner's lifetime but which upon and by reason of his death become worth a greater or a lesser amount to his estate has become clouded in uncertainty. Indeed if the court below is followed in evaluating interests which become worth more on death and the Tax Court is followed in evaluating interests which become worth less on death, it is a "heads we win, tails you lose" proposition in favor of the Government. To illustrate: Assume A by contract grants B an option to purchase at $50. per share from A's estate after A's death all the stock which A may

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* The present provisions are found in Sections 2031 and 2033 of the Internal Revenue Code of 1954 and Sections 20.2031-1 and 20.2031-2 of the Treasury Department's Estate Tax Regulations.

own in a given corporation at the time of his death. Assume that on the date of A's death the market value of such stock is $100. per share. The most the estate can realize from the stock is $50. per share. This is the exact converse of our case (where the estate could realize at *least* the par value of the bonds), and under the rationale of the decision below it would seem that the stock should be valued for estate tax purposes at what it would be worth to the estate and not at its date-of-death market value. Nevertheless in just such cases (*Estate of James H. Matthews*, 3 T. C. 525 (1944), and *Claire Giannini Hoffman*, 2 T. C. 1160 (1943), affd. 148 F. 2d 285 (9 Cir., 1945), cert. denied 326 U. S. 730) the Government has maintained and the Tax Court has held that the proper amount to be included in the estate tax return is not what the securities become worth upon and by reason of the owner's death, but rather their date-of-death market value.

The First Circuit has implied it would disagree with the decision below. In *Collins* v. *Commissioner of Internal Revenue*, 216 F. 2d 519 (1 Cir., 1954), the question was as to the proper valuation of Treasury Bonds, Series G, which are nonmarketable. Lack of a market price obviously cannot be allowed to be a barrier to valuation, and the First Circuit declared:

> "Where there is no market price because the property is not transferable, the Tax Court has to take into account all relevant facts and elements of value." (216 F. 2d at 523.)

The inference is inescapable, especially in light of the Treasury Regulations (Appendix A, *infra*), that *where there is a market price* it is decisive of value. In his concurring opinion in the *Collins* case Chief Judge Magruder says so in so many words:

> "If the particular property has an ascertainable fair market value, that value is normally determinative." (216 F. 2d at 524.)

The precise question decided below has not been passed upon by this Court or another Court of Appeals.* Nevertheless the Second Circuit's holding is not only impossible to reconcile logically with the language of the statute, which imposes a tax upon the value of the decedent's interest "at the time of his death" (Int. Rev. Code, 1939, Sec. 811(a); Int. Rev. Code, 1954, Secs. 2031, 2033) but it conflicts with a guiding principle of estate taxation expounded in *Edwards* v. *Slocum*, 264 U. S. 61, where this Court stated that the estate tax "taxes . . . 'not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death'." (264 U. S. at 62-63.)

The question presented is of substantial importance, affecting as it does the owners of Government bonds across the nation, and is worthy of the attention of this Court.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GERALD DONOVAN,
Attorney for Petitioner.

RICHARD P. DONOVAN,
Of Counsel.

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* A case indistinguishable in principle (*Land* v. *United States*, 187 F. Supp. 521 (S. D. Ala., 1960)) is now pending before the Fifth Circuit, the District Court having decided in favor of the taxpayer.

APPENDIX A

Treasury Department Regulations

Regulations 105

Section 81.10, Valuation of Property

(a) General. The value of every item of property includible in the gross estate is the fair market value thereof at the time of the decedent's death; . . . . The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. The fair market value of a particular kind of property includible in the gross estate is not to be determined by a forced sale price. Such value is to be determined by ascertaining as a basis the fair market value as of the applicable valuation date of each unit of the property. For example, in the case of shares of stock or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the applicable valuation date should be considered in every case. * * *

(c) Stocks and bonds. (1) The value of stocks and bonds, within the meaning of the Internal Revenue Code, is the fair market value per share or bond on the applicable valuation date. * * *

(3) In the case of stocks and bonds which are not listed upon an exchange, but are dealt in through brokers, or have a market, the fair market value shall be determined by taking the mean between the highest and lowest selling prices as of the valuation date; or, if there were no sales on that date, such value shall be determined by taking the mean between the highest and lowest sales on the nearest date before and the nearest date after the valuation date (both such nearest dates being within a reasonable period), and by prorating the difference between such mean prices to the valuation date, and by adding or subtracting, as the case may be, such prorated portion of the difference to or from the mean price obtaining on such nearest date before the valuation date. * * *

(6) If actual sales or bona fide bid and asked prices are not available, then, in the case of corporate or other bonds, the value is to be arrived at by giving consideration to the soundness of the security, the interest yield, the date of maturity, and other relevant factors. . . .

(7). In cases in which it is established that the value per bond or share of any security determined on the basis of selling or bid and asked prices as provided in this paragraph does not reflect the fair market value thereof, then some reasonable modification of such basis or other relevant facts and elements of value shall be considered in determining fair market value.

APPENDIX B

Opinion of the Court of Appeals

[TITLE]

(Argued November 1, 1960 Decided December 12, 1960.)

BEFORE: HAND, SWAN and MEDINA, Circuit Judges.

SWAN, Circuit Judge:

This is an action by the executor of the will of Harriet Delta Ellis to recover an alleged overpayment of the decedent's estate tax. She died in April 1953 leaving a gross estate valued in excess of $5,000,000, and her executor filed an estate tax return reporting a net tax of more than $1,900,000. Included in the assets of the decedent's estate were United States Treasury bonds having par value of $475,000 at the date of her death but a market value $26,965.62 less than par on that date. These bonds had a redemption value of par if applied by the executor in payment of decedent's federal estate tax. In determining the estate tax the bonds were valued at par.[1] The present action sought recovery of $13,968.20 plus interest as the alleged overpayment of tax attributable to excess valuation of the Treasury bonds. The facts being undisputed each party moved for summary judgment. In an opinion reported in 178 F. Supp. 267, the district court held that the bonds should have been valued at market price, and granted plain-

[1] Two of the bonds, each of the face value of $100,000, were actually applied by the executor in partial payment of the estate tax. A footnote in appellee's brief states that the others were retained by the executor and their market value rose above par.

tiff's motion. Defendant's appeal raises only one question, namely, whether in determining the estate tax the bonds should be valued at par or at their market value on the date of decedent's death.

Section 811 of the Internal Revenue Code of 1939 provides that the value of the gross estate of the decedent shall include "the value at the time of his death of all property • • • to the extent of the interest therein of the decedent at the time of his death:"

Pertinent provisions of Treasury Regulations 105, § 81.10 are reproduced below.[2] The district court held that the logical application of these regulations entitled the plaintiff to value the bonds at their market value on the date of the decedent's death. We disagree. To so hold disregards, in our opinion, the provision in paragraph (a) that "All relevant facts and elements of value as of the applicable valu-

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[2] "(a) General. The value of every item of property includible in the gross estate is the fair market value thereof at the time of the decedent's death; • • • The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell. • • • All relevant facts and elements of value as of the applicable valuation date should be considered in every case. • • •

"(c) Stocks and bonds. (1) The value of stocks and bonds, within the meaning of the Internal Revenue Code, is the fair market value per share or bond on the applicable valuation date. • • •

"(6) If actual sales or bona fide bid and asked prices are not available, then, in the case of corporate or other bonds, the value is to be arrived at by giving consideration to the soundness of the security, the interest yield, the date of maturity, and other relevant factors. • • •

"(7) In cases in which it is established that the value per bond or share of any security determined on the basis of selling or bid and asked prices as provided in this paragraph does not reflect the fair market value thereof, then some reasonable modification of such basis or other relevant facts and elements of value shall be considered in determining fair market value."

ation date should be considered *in every case*" [italics added], and also disregards subdivisions 6 and 7 of paragraph (c).

Ordinarily of course, the Wall Street quotations of any particular class of bonds reflect the price at which the bonds "would change hands between a willing buyer and a willing seller." In the sale of Treasury bonds of the class here involved the market quotation reflects the "elements of value" due to the fact that when the holder dies his executor may use the bonds at par value as a credit against his estate tax. But obviously such sales do not reflect the full value of such a bond to the estate of the particular holder whose death establishes the valuation date. Such a bond quoted in the market at less than par is clearly now worth par in the hands of the decedent's executor. Indeed, the plaintiff applied two of the bonds at par value in partial payment of the large estate tax owed to the Government, and the others might have been so applied.

We see no merit in the theory that it would be impracticable to differentiate between estates in one of which, as here, all the bonds could have been so applied, and another in which none or only some of the bonds could be so used. Where the bonds cannot be so used, their value to the estate is their market price, whether that be below or above par; where they can be so used, their value is at least par. Cf. *Guggenheim* v. *Rasquin*, 312 U. S. 254, 257, where the court said: "* * * an important element in the value of the property [fully paid life insurance] is the use to which it may be put." See *Collins* v. *Commissioner*, 1 Cir., 216 F. 2d 519, which involved a different class of bonds but inferentially at least supports the appellant's contention. We think the rationale of the stock option cases also in point. *Wilson* v. *Bowers*, 2 Cir., 57 F. 2d 682; *Lomb* v. *Sugden*, 2 Cir., 82 F. 2d 166; *May* v. *McGowan*, 2 Cir., 194 F. 2d 396. Cases relied upon by the appellee are distinguishable. *Estate of*

Matthews, 3 T. C. 525; *Claire Giannini Hoffman*, 2 T. C. 1160, affirmed, *sub nom. Giannini* v. *Commissioner*, 9 Cir., 148 F. 2d 285, cert. denied 326 U. S. 730; *Baltimore National Bank* v. *United States*, D. C. Md. 136 F. Supp. 642. They properly place emphasis upon the fact that the options did not become effective until after the decedent's death, and therefore did not affect the value of the property at the moment of his death.

Judgment reversed and cause remanded wih directions to grant appellant's motion for summary judgment.

Appendix B

Judgment of Court of Appeals

[TITLE]

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of December one-thousand nine hundred and sixty.

PRESENT:

HON. LEARNED HAND,
HON. THOMAS W. SWAN,
HON. HAROLD R. MEDINA,
Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded with directions to grant appellant's motion for summary judgment in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

Appendix B

Opinion of the District Court

(Title)

(Filed November 5, 1959)

RYAN, Chief Judge

Plaintiff and defendant have moved for summary judgment on the first count pleaded in the complaint wherein plaintiff seeks to recover $13,968.20, on the ground that it represents an illegal and excessive estate tax levied and collected of the plaintiff Executor.

We are not concerned with the second count of the complaint, which seeks recovery of the sum of $1,951.23 illegally levied and collected as additional estate tax of this same plaintiff Executor, for it is conceded that there is no valid defense to this claim.

None of the material facts appear to be in dispute.

Decedent, at the time of her death on April 23, 1953, owned, besides other properties of substantial value, the following United States Treasury Bonds:

Bonds					*Redemption and Par Value*
U. S. A. Treasury Bonds			2½'s	6/15/1969-64	$ 10,000.00
"	"	"	"	12/15/1969-64	15,000.00
"	"	"	"	3/15/1970-65	150,000.00
"	"	"	"	/1971-66	100,000.00
"	"	"	"B" 2¾	4/ 1/1980-75	200,000.00
					$475,000.00

All of the bonds were of issue which could have been applied at par in payment of Federal estate taxes amounting to $1,937,886.74, which are conceded by the plaintiff Executor to have been payable by the estate. The plaintiff did in fact so apply at par value the two $100,000 2¾% Treasury Bonds, Series B-1980-75 on account of the estate tax due

and payable; it might have availed itself of the same right and similarly applied the remaining $275,000 of Treasury Bonds owned by the decedent. It did not choose to do so.

The bonds, at the date of decedent's death, had a current market quotation totaling $448,034.38, which plaintiff Executor claims should have been the value ascribed to them for Federal estate tax purposes. However, pursuant to Revenue Ruling 156, 1953-2 Cumulative Bulletin 422, the Executor valued the bonds at par in the estate tax return. A claim for refund seeking the lower valuation was timely filed and rejected by the Director of Internal Revenue and this suit followed.

By valuing the bonds at par rather than market value, their taxable value was increased by $26,965.62. This resulted in the collection of estate taxes increased by $13,968.20, which is the subject of the first claim in this suit.

The only question presented for decision is whether, in valuing the decedent's estate for Federal estate tax purposes, these United States Treasury Bonds, which could have been applied at par by the Executor in payment of Federal estate taxes due, were properly valued at their par value, or whether they should have been valued, as plaintiff claims, at their then current market quotation.

We feel that plaintiff's position must be sustained. The serious task of valuing estate assets for tax purposes cannot be determined by such chance events as the size of the estate or volume of Treasury securities among the assets. The treasury regulations themselves provide that "the value of every item of property includible in the gross estate is the *fair market value* thereof at the time of the decedent's death . . . " Treasury Reg. 105, Sec. 81.10, 7 C. F. R. 1429. In the same regulation, under the heading "Stocks and Bonds", the value is described as the "fair market value per share or bond on the applicable valuation date".

Despite these clear regulations, the Government asserts that the chance which occurred in this estate, that the bonds

could have been redeemed at par in payment of Federal estate taxes, changed the rule which is applicable to all other estate assets. Nothing, however, in the Internal Revenue Code, nor in the Regulations issued by the Treasury Department, makes it mandatory to redeem the bonds by paying estate taxes with them.

The very ruling on which the Government relies, which, of course, does not have the standing of law, points to the anomalous results which would be inevitable if the Government's theory were upheld. That ruling provides that to the extent marketable Treasury securities owned by a decedent may be applied at par in payment of Federal estate taxes, par (or market value, if higher) constitutes the value for inclusion in the gross estate; as to bonds in excess of those which could be used at par for estate taxes, the market price is their value. In other words, two identical bonds would have two different values for inclusion in the gross estate, dependent upon the accident of the amount of the estate tax payable. Indeed, two decedents dying on the same date, with identical assets, would have different values ascribed to them by the Government if perchance one estate was subject to a marital deduction and thus paid a lower tax than the other. We certainly do not consider that either Congress or the Treasury Department intended such confusion to be injected into the already complex area of gross estate valuation.

The Government's reliance on *Estate of Mary Gowdy* v. *Commissioner*, 21 T. C. 219 (1953) affd. sub. nom. *Collins* v. *Commissioner*, 216 F. 2d 519 (1 Cir., 1954) is misplaced. There the courts dealt with the valuation of United States Treasury Bonds, Series G, a non-marketable and non-assignable security. Series G bonds are, by their terms, redeemable at par on the death of the owner, no matter what the size of the estate or the amount of the tax. Accordingly, the courts in *Collins* considered the fact that there was no "fair market value" for G bonds in determining

their estate value to be par.[1] Additionally, every Series G bond automatically becomes worth par upon its owner's death; on the other hand, the marketable Treasury bonds involved in this suit could not, even under the Government's thesis, be said to be worth par until and unless an estate tax is found to be due and owing on their deceased owner's estate, which may be some considerable time after date of death.

The logical application of Treasury Department Regulations entitles plaintiff to value the bonds in question at their market value on the date of decedent's death. The fact that the estate may realize a capital gain by redeeming the bonds at par in payment of federal estate taxes cannot operate to change their date of death value for inclusion in the gross estate. The date of death value is the fair market value on such date, which is established by the price at which these securities were freely traded by willing sellers and willing purchasers who, of necessity, considered all valuation factors including the limited redeemability at par for estate taxes.

Plaintiff's motion for summary judgment is granted on each count in the complaint; defendant's motion for summary judgment on the first count is denied.

On the settlement of the orders hereon, the Court will consider the suggestions of counsel on the prayer for relief labelled "(d)" in the complaint, concerning reduction in the estate tax by the expense to the estate for attorneys' fees in this suit. Settle orders on notice.

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[1] While not determinative, the Government points out that this plaintiff recognized the validity of the *Collins* rule by valuing some $650,000 of G bonds at par in the gross estate. We agree that this is the correct procedure.